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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DAVID BULLOCH, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

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The Court need go no further than the question presented in the government's brief (Br. in Opp. i) to discern how important the standards for judging a Rule 60(b) motion are for resolving the outcome of this case. The government poses the question presented as whether "petitioners failed to produce evidence substantiating their contention that the government committed fraud upon the court." But the answer to that question depends completely upon the legal test used to make that determination. If the court of appeals correctly required petitioners to prove that the government's tampering with witnesses "corrupted the court," then the government is surely correct that we failed to satisfy our burden of proof. If, however, petitioners were required only to demonstrate that a deception was practiced by government employees with the knowledge and tacit approval

of attorneys for the government, and that this conduct was likely to have affected the outcome of the case, then the district court correctly granted petitioners a new trial. Accordingly, the outcome of this case depends upon the court of appeals' interpretation of Fed. R. Civ. P. 60(b).

1. The government does not dispute petitioners' claim (Pet. 10-11) that the legal standard announced by the Tenth Circuit *en banc* conflicts with this Court's decision in *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238 (1944), and with the decisions of every other court of appeals that has considered this issue. See cases cited Pet. 10-11. Instead, the government treats the court's legal analysis as though it were merely a sport; the "statement does not purport to be a precise legal definition." (Br. in Opp. 14). This characterization, however, ignores the context in which the statement was made. Petitioners sought rehearing *en banc*, in part, to correct the manifest error in the panel's interpretation of Rule 60(b). (Supplemental Br. on Rehearing 35-39). Judge McKay, in his dissent, took the majority to task for adopting an inappropriate legal standard for Rule 60(b). If the legal analysis employed by the court was irrelevant to its disposition of this case or was not intended to be taken seriously, it is incredible in the face of those challenges that the court of appeals would not have said so.

The reason no such statement appears is plain: a careful reading of the pivotal passages of the majority opinion reveals that the legal standard for Rule 60(b) was in fact crucial to the court of appeals' reversal of the district court's decision to grant a new trial. Contrary to the government's claim, the court of appeals did not ultimately hold that there was no evidence of fraud at all. Instead, the majority disposed of the "showing made by plaintiffs" regarding the suppression of documentary evidence prior to the 1956 trial as falling "short of proof of fraud on the court *or any other kind of fraud.*" (Pet.

App. 13a; emphasis added). The government, of course, relies upon this passage. But, in the next paragraph of its opinion, the majority turned to the crucial basis for the district court's holding that there had been a fraud on the court, *viz.*, the government's successful effort to influence the veterinarians' testimony regarding causation. On that issue, the majority did not (and properly could not) conclude that there was no evidence of fraud. Instead, the court held that "*nothing was demonstrated which would constitute fraud on the court.*" Pet. App. 13a. That conclusion, however, necessarily depended upon the Tenth Circuit's unduly restrictive interpretation of fraud on the court within the meaning of Rule 60(b). The government's opposition completely ignores this part of the Tenth Circuit's opinion.

It is therefore inappropriate for the Court to disregard the court of appeals' legal reasoning concerning Rule 60(b). An important Federal Rule of Civil Procedure, which exists both to protect the integrity of the judicial process and to regulate the ethical conduct of officers of the courts (see Pet. 12), has been emasculated by the court of appeals. Absent bribery or similarly corrupting conduct by a litigant, the Tenth Circuit does not recognize fraud on the court, and the government has implicitly conceded that this standard conflicts with the approach followed by all other courts. Because the Tenth Circuit was sitting *en banc*, that conflict can now be resolved only by this Court, and accordingly, the petition for certiorari should be granted.

2. Although petitioners submit that a fair reading of the opinion below clearly reveals the importance of the court's legal standard under Rule 60(b) to the outcome of this case, the government nevertheless seems to argue (Br. in Opp. 9-13) that the same result could have been reached without regard to any Rule 60(b) standards. The government's argument, like the court of appeals' analysis, however, accords no respect to the fact-finding function of the district court. See Fed. R. Civ. P. 52.

The government asserts that the court of appeals made a "thorough review of the record" in reaching *its* findings regarding fraud. The government ignores the opportunity the district court had to observe the witnesses and Judge Christensen's unique perspective in deciding this case, having presided over both the original trial and the Rule 60(b) motion. Moreover, regardless of whether or not the court of appeals "was surely aware of the well settled principles governing appellate review" (Br. in Opp. 9), it showed no fidelity to those principles. Compare *County of Los Angeles* v. *King*, No. 85-295 (Nov. 4, 1985) (per curiam). To take merely one example, it is simply impossible to examine the evidence surrounding Dr. Veenstra's testimony at the 1956 trial and conclude that no reasonable trier of fact could make a finding that the government acted improperly. The government's opposition is noteworthy for its complete unwillingness or inability to explain why Dr. Veenstra's letter of April 7, 1955, which completely supported petitioners' position on causation, would bear the statement at the top, most likely written by a Justice Department attorney: "This letter was not sent—has not been published and *is confidential to the Department.*" (Pet. App. 68a; emphasis added).[1]

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[1] Although the court of appeals (Pet. App. 3a, 5a) and the government (Br. in Opp. 6, 7) repeatedly assert that nothing was revealed at the Rule 60(b) hearing that was not available in 1956, that statement is at best misleading. The Veenstra letter, not surprisingly, was never delivered to petitioners in 1956. Thus, even though petitioners knew that Veenstra agreed with them on the issue of causation, they had no reason to suspect that Veenstra's weakened testimony at trial was the product of improper government influence.

There is no small irony in the government's decision to close its brief in opposition by faulting petitioners' counsel's "trial strategy" with respect to witnesses like Veenstra. That strategy was predicated on the assumption that the government was litigating in good faith. Counsel's only error was in believing that the government would strike hard blows but *not foul ones. Berger* v. *United States*, 295 U.S. 78, 88 (1935) (emphasis added). As the evidence reveals, that was a mistake.

Nor does the government attempt to explain the strange coincidence that on the very day that Veenstra's typed letter was delivered to a Justice Department attorney and just after government officials met with Veenstra, he suddenly, and without actually having seen any new experimental data, would draft a new letter "abdicating his long-time and forcefully defended position that radiation was a contributing cause" of the death of petitioners' sheep. (Pet. App. 70a).[2] While this evidence perhaps could be interpreted in different ways, it is surely sufficient to support the district court's finding, also supported by other evidence (see Pet. 6-8), that government officials, with the tacit approval of government attorneys, improperly withheld and "weaken[ed] evidence which the [District] Court should have been permitted to consider on its own merits in connection with other evidence in the case" (Pet. App. 75a).

3. With respect to the issue of petitioners' diligence in bringing the Rule 60(b) motion, the government argues (Br. in Opp. 14-15) that delay was not central to the court of appeals' disposition of the case and that, in any event, petitioners failed to suggest why delay should not be a relevant consideration.[3] First, if the government's reading is correct, it is difficult to understand why the court would repeatedly discuss petitioners' diligence. See

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[2] The government suggests (Br. in Opp. 11) that Veenstra's testimony at trial strongly supported petitioners' arguments. But the district court, which witnessed Veenstra's testimony, found it to be "most unimpressive" because, under government pressure, Veenstra "discounted his status as an expert . . ." (Pet. App. 71a).

[3] The government's characterization of the delay as "unexcused" and "unreasonable" (Br. in Opp. 15) is inconsistent with the findings of the district court that important documents were concealed by the government (Pet. App. 11a-13a), which the court of appeals did not and could not reject as clearly erroneous. For instance, no amount of diligence would have uncovered the Veenstra letters. Only the intervention of Congress in 1979-1980 succeeded in opening the government files containing those documents to petitioners.

Pet. App. 10a, 11a-12a (petitioners "have a heavy burden to demonstrate why they waited these many years. . ."). Indeed, the court's heavy reliance on due diligence undercuts the government's theory that the court decided the case solely on the basis of no evidence of fraud. Only if there were proof of fraud would the court have reason to consider lack of diligence as a basis for not reopening the case. But, in any event, this Court made clear in *Hazel-Atlas*, that the interest in judicial integrity was so strong that counsel's lack of diligence was completely irrelevant in deciding whether to grant a new trial. 322 U.S. at 246; Pet. 12. Accordingly, because the court of appeals clearly regarded counsel's "lack of diligence" as a relevant factor in denying petitioners a new trial, review by this Court is warranted in order to decide whether *Hazel-Atlas* is still a proper interpretation of Rule 60(b).

4. This "is not an ordinary case with mere private or even ordinary public concerns" (Pet. App. 87a); it is a case that raises a basic and recurring issue concerning the ethics of attorneys, and of particular significance, government attorneys, which arises out of an extraordinary time and set of events in this nation's history. The above-ground nuclear tests in Nevada in the 1950s have caused significant human concern, especially in Utah. The district court's thoughtful conclusion, that the trial in 1956 concerning the effects of radiation released by the government's nuclear tests was conducted unfairly, has raised legitimate doubts about the federal government's integrity in responding to the possible health and safety risks posed by those tests; doubts which the court of appeals' conclusory reversal cannot eliminate. The court of appeals' treatment of Rule 60(b), by itself, warrants this Court's review, but the circumstances surrounding the case make it imperative that the propriety of the government's conduct not be adjudged finally by any court other than this one.

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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